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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DAVID PALAND, Plaintiff and Appellant, v. BROOKTRAILS TOWNSHIP COMMUNITY SERVICES DISTRICT et al., Defendants and Respondents.	A154968 (Mendocino County Super. Ct. No. SCUK-CVPO-2018-70732)

The instant appeal involves the latest chapter in David Paland's long running dispute with the Brooktrails Township Community Services District (District) regarding base rates for water and sewer services. Paland appeals from an order declaring him a vexatious litigant and requiring him to post security. We affirm.

BACKGROUND

A.

The vexatious litigant statutes (Code Civ. Proc., § 391 et seq.)[1] are "designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants. [Citation.] . . . [¶] 'Vexatious litigant' is defined in section 391, subdivision (b) as a person who has, while acting in propria

[1] Undesignated statutory references are to the Code of Civil Procedure.

persona, initiated or prosecuted numerous meritless litigations, relitigated or attempted to relitigate matters previously determined against him or her, repeatedly pursued unmeritorious or frivolous tactics in litigation, or who has previously been declared a vexatious litigant in a related action." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169–1170.)

The statutes provide two remedies. First, in pending litigation, the defendant may move for an order requiring a vexatious litigant to furnish security on the ground he or she has no reasonable probability of prevailing. (*Shalant v. Girardi*, *supra*, 51 Cal.4th at p. 1170; § 391.1.) If the plaintiff fails to provide the ordered security, "the litigation shall be dismissed." (§ 391.4.) A court may also enter a prefiling order, which " 'operates beyond the pending case' " by prohibiting a vexatious litigant from filing any new litigation in propria persona without first obtaining permission from the presiding judge. (*Shalant*, at p. 1170; accord, § 391.7, subd. (a).)

B.

Paland I

We take the facts largely from opinions filed in two prior appeals to this court: *Paland v. Brooktrails Township Community Services Dist. Bd of Directors* (2009) 179 Cal.App.4th 1358 (*Paland I*) and *Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195 (*Paland II*).

The District provides water and sewer service to real property parcels in or near Willits, California. In 1986, Paland, a property owner in the District, connected his parcel to the water and sewer systems and paid $1,800 in connection fees. In addition to connection fees at the time of hookup, parcels connected to the water and sewer systems were thereafter charged fixed monthly water and sewer "base rates," as well as inclining usage-based rates for water service. Sewer connections were not subject to a usage charge beyond the monthly base rate.

Before 2003, the District did not charge base rates to parcels with existing connections that were inactive because the parcels were either undeveloped or unoccupied, or because the owners had temporarily discontinued their service. The

District changed its policy in 2003 and began charging monthly base rates to parcels with existing utility connections, regardless of whether the owner was actually using the District's services.

In late 2006, Paland fell behind on his bills. Paland wrote the district general manager, stating his water had been turned off, he would pay the arrears as soon as he could, he could not afford to pay ongoing base rates because he was unemployed, and, "[f]or that reason, I have no plans to ask you to turn the water back on until I can afford the huge base rate." By the end of January 2007, Paland apparently had paid his arrears through November 2006. Paland's subsequent monthly bills reflect no actual water usage. The District, however, continued to charge Paland the monthly base rates for both water and sewer services.

In 2007, Paland, acting in propria persona, sued the District's Board of Directors. He alleged the monthly base rates, when charged to customers whose water service had been turned off, were "standby charges" subject to the owner voting requirements of California Constitution, article XIII D, section 4, and the District had failed to comply with those requirements. The District prevailed in the trial court, and Paland appealed.

In *Paland I*, this Division agreed with the trial court that Proposition 218 (Cal. Const., arts. XIII C, XIII D) did not entitle Paland to relief because the monthly base rates were fees for immediately available property-related water and sewer services, rather than standby charges or assessments, and exempted from the voter approval requirement by California Constitution, article XIII D. (*Paland I*, *supra*, 179 Cal.App.4th at pp. 1361–1362, 1364–1365, 1371.) *Paland I* also rejected, as unsupported, Paland's argument that his 1986 payment of the connection fee gave him a contractual right to access the water and sewer systems without additional charges for maintenance or operation of the system absent voter approval of an assessment or his actual use. (*Id.* at p. 1371.) The California Supreme Court denied Paland's petition for review, and the United States Supreme Court denied Paland's petition for certiorari in April 2010.

C.

Paland II

Paland then drafted and sponsored Measure D, "An Initiative to Prevent the [District] from Imposing Mandatory Water and Sewer Base Rates After Service Has Been Discontinued." Measure D provided: "The [District] shall not collect base rate service charges, or any other service charges, for water or sewer service, for more than two days after the customer has requested discontinuance of service. The District shall not require that a parcel owner relinquish a water or sewer connection as a condition of discontinuing service. . . . Merely having pipes connected to the District's water or sewer system is not a service that may be charged for." At the November 2, 2010 election, Measure D passed by a simple majority vote. At the same election, the voters of the state adopted Proposition 26, which expanded the definition of what constitutes a "tax" for purposes of article XIII C.

The District sued the Board of Supervisors and the County Clerk of Mendocino County for declaratory relief, alleging Measure D was "facially unconstitutional" and should not be enforced "for want of having achieved a two-thirds vote" as required by Proposition 26. Paland was allowed to intervene as a defendant but not permitted to file a cross-complaint against the District. After a bench trial, the trial court agreed with the District that the effect of Measure D would be to increase base rates for property owners who remained connected, which amounted to a "tax" under the new definition adopted in Proposition 26 and necessitated a supermajority vote.

Paland appealed and our colleagues in Division Two reversed, concluding Proposition 26 did not apply retroactively to overturn the Measure D election result. (*Paland II, supra*, 218 Cal.App.4th at pp. 205–208.) Acting in propria persona, Paland filed a petition for rehearing, in which he argued *Paland I* should be "vacated" because it "defeated the intent and purpose of Proposition 218." Paland also asked the *Paland II* court to declare the District had wrongfully collected standby charges since 2003. Division Two denied the petition for rehearing.

D.

Paland III and IV

A few months later, Paland filed another propria persona lawsuit (*Paland III*), against the District and its individual directors, in the United States District Court for the Northern District of California. In *Paland III*, Paland alleged the District had, since 2007, charged base utility rates that he characterized as unconstitutional "standby charges." Recognizing this issue had been decided against him in *Paland I*, Paland asserted *Paland I* had been wrongly decided and he could relitigate the matter due to alleged fraud or based on a public interest exception to res judicata. He also alleged the District continued to charge him monthly base rates after the effective date of Measure D and his request to discontinue his water service. Paland sought damages for breach of contract, violation of section 1983 of title 42 of the United States Code, and violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962).

The District Court dismissed the suit "without prejudice to any rights [Paland] may have to pursue his claims in state court." Recognizing Paland's complaint was largely presented as an attack on *Paland I*, the court stated it was prohibited from exercising jurisdiction over a de facto appeal of a final judgment entered in state court. The court specified Paland may "at least in theory" have a new claim not previously adjudicated involving the District's timely compliance with Measure D, but it declared any such claim should be filed in state court. Acting in propria persona, Paland appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed.

In April 2018, Paland, again acting in propria persona, filed the instant lawsuit against the District and the Brooktrails Board of Directors (*Paland IV*). He asserts eight causes of action: (1) negligent violation of an ordinance preexisting Measure D; (2) negligent violation of Measure D; (3) negligent violation of California Constitution Article XIII D; (4) fraud; (5) quasi-contract; (6) breach of contract; (7) elder abuse (Welf. & Inst. Code, § 15610.07); and (8) violation of section 1983 of title 42 of the United States Code. Paland's third, fifth, sixth, and eighth causes of action are primarily based on allegations that the District had, since 2007, imposed base rates he characterized as

"standby charges" violating article XIII D of the California Constitution and his contractual rights.

E.

Motion for Declaration of Vexatious Litigant

The District moved for an order declaring Paland a vexatious litigant, pursuant to section 391, subdivision (b)(2) and (3), and requiring him to post security to proceed with *Paland IV*. (§§ 391.1, 391.3.) In his opposition to the motion, Paland conceded he was, at least in part, seeking to relitigate *Paland I*. Paland contended he was not precluded from doing so and argued he had a reasonable probability of prevailing.

The trial court found Paland had repeatedly attempted to relitigate issues decided in *Paland I*, and he had no reasonable probability of prevailing in the instant action. The court granted the District's motion, declared Paland a vexatious litigant, and ordered him to post $40,000 in security by August 2, 2018. The trial court's written order also states, "In the event that security is not timely deposited . . . the current action shall be dismissed. . . pursuant to . . . [section] 391.4." Paland did not post the security and, before judgment was entered, appealed directly from the trial court's order.[2]

DISCUSSION

Paland contends substantial evidence does not support the trial court's findings he is a vexatious litigant who had no reasonable probability of prevailing. We disagree.

A.

The District raises concerns regarding our jurisdiction to hear an appeal from an order that, according to it, is not directly appealable. The District has a point. Paland did not appeal from a judgment and, apparently, neither a judgment nor order of dismissal has ever been entered. An interlocutory order designating a person to be a vexatious litigant and requiring the posting of security is not expressly made appealable by

[2] We deny the District's February 13, 2019 request for judicial notice of a document filed by Paland in another action after he filed the instant appeal. The District fails to demonstrate its relevance to the issues on appeal. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1.)

section 904.1. At least one court has held such an order declaring a person a vexatious litigant and ordering the posting of a security is not itself appealable, and an appeal may be taken only from the final judgment or order of dismissal. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 635.)

However, recognizing the matter has been fully briefed and judicial resources would be better served by immediately considering the merits, the District maintains the order is directly appealable under the collateral order doctrine or, in the alternative, asks us to consider the appeal as a petition for extraordinary writ. We need not resolve the appealability issue because, even if the order is not appealable, we would exercise our discretion to treat the appeal as a petition for writ of mandate. (*Quintanar v. County of Riverside* (2014) 230 Cal.App.4th 1226, 1232.)

B.

Because the trial court weighs the evidence in determining whether a person is a vexatious litigant and whether he or she has a reasonable chance of prevailing (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 786), we review both findings for substantial evidence. (*Golin v. Allenby, supra*, 190 Cal.App.4th at p. 636.) "[W]e presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment." (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219.)

C.

Paland elected to proceed with a clerk's transcript and no record of the trial court's oral proceedings. Although this is permissible (Cal. Rules of Court, rule 8.120(b)), the burden nevertheless remained on Paland to affirmatively show error on an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574–575.) Paland challenges factual findings made after a hearing at which the trial court was permitted to weigh the evidence. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP, supra*, 40 Cal.4th at p. 786.) By failing to provide a transcript of that hearing, Paland fails to carry his burden to establish the absence of substantial evidence to support the trial court's findings. On this basis alone, the order must be affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281,

1295–1296.) Notwithstanding the deficient record, we will address the merits and conclude that the record before us does not support Paland's position.

D.

First, we consider whether substantial evidence supports the trial court's finding Paland is a vexatious litigant. Section 391, subdivision (b)(2), defines a vexatious litigant as a person who, "[a]fter a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." (§ 391, subd. (b)(2).)

Paland I qualifies as litigation "finally determined." (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 993 ["judgment is final for all purposes when all avenues for direct review have been exhausted"].) Although his opening brief on appeal is not a model of clarity, Paland appears to challenge only the finding he has repeatedly attempted to relitigate the validity of *Paland I* or the issues of fact or law determined therein. (§ 391, subd. (b)(2).)

"Repeatedly" refers "to a past pattern or practice on the part of the litigant that carries the risk of repetition in the case at hand. [¶] Of course, the risk of repetition is fairly easy to demonstrate in situations where the defendant seeking security has been the target of previous relitigation attempts or the case involves facts or circumstances similar to those in which the plaintiff sought to relitigate." (*Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 Cal.App.4th 1494, 1505.)

After reviewing the record, we conclude there is substantial evidence supporting the trial court's finding Paland repeatedly attempted to relitigate *Paland I*'s validity or the claims and issues determined therein. For example, in his *Paland II* petition for rehearing, in *Paland III*, and then again in *Paland IV*, Paland repeatedly asserts the District's base rates charges, incurred before Measure D's effective date, are standby

charges imposed in violation of Article XIII D of the California Constitution and in violation of his contractual rights. Both issues were finally determined in *Paland I*. (*Paland I, supra*, 179 Cal.App.4th at pp. 1361–1362, 1364–1365, 1371.)

In fact, Paland's primary position on appeal is that he is *entitled* to relitigate such issues due to fraud or because relitigation of *Paland I* is in the public interest. Suffice it to say, for now, that this argument is a concession that Paland *has* repeatedly attempted to relitigate the validity of *Paland I* and that he continues to attempt to do so. Substantial evidence supports the conclusion Paland is a vexatious litigant under section 391, subdivision (b)(2).

E.

Paland also challenges the trial court's finding he has no reasonable probability of prevailing. Section 391.1 provides the court may require a vexatious litigant to post security, as a condition of proceeding with a lawsuit, if it determines there is no "reasonable probability that he or she will prevail in the litigation against the moving defendant." (See § 391.3, subd. (a); *Moran v. Murtaugh Miller Meyer & Nelson, LLP*, *supra,* 40 Cal.4th at p. 783.) "This showing is ordinarily made by the weight of the evidence but . . . may also be shown by demonstrating that the plaintiff cannot prevail . . . as a matter of law." (*Golin v. Allenby*, *supra,* 190 Cal.App.4th at p. 642.)

Paland's third, fifth, sixth, and eighth causes of action are all primarily barred by res judicata or collateral estoppel. (See *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896 ["[r]es judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties"]; *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 257 [" 'collateral estoppel bars the party to a prior action . . . from relitigating issues finally decided against him in the earlier action' "].)

We are unpersuaded by Paland's various attempts to convince us *Paland I* does not preclude Paland's claims that the District's base rates charges, incurred before Measure D's effective date, are standby charges imposed in violation of Article XIII D of the California Constitution and in violation of his contractual rights. (See *Caldwell v.*

Taylor (1933) 218 Cal. 471, 475 [“proceeding for equitable relief is not a collateral attack, and since its sole aim and purpose is to avoid the effect of said judgment, the doctrine of res judicata can have no application”]; *Palmdale Hospital Medical Center v. Department of Health Services* (1992) 8 Cal.App.4th 1306, 1310 [“ ‘when the issue is a question of law . . . , the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed’ ”].)

First, Paland has not sought equitable relief; he is seeking damages. Paland also has not alleged extrinsic fraud that prevented him from appearing or presenting all of his case in *Paland I*. (See *Caldwell v. Taylor, supra*, 218 Cal. at p. 477.) Second, the public interest exception applies where the consequences of any error “transcend those which would apply to mere private parties,” such as where “taxpayers statewide will suffer unjustly.” (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64–65.) Here, Paland has not demonstrated the potential for any similar consequences. *Paland IV* seeks to benefit no one but himself.

We address Paland’s first, second, fourth, and seventh causes of action separately because we assume, without deciding, these claims are not precluded by *Paland I*. In his first cause of action, Paland alleges the District’s imposition of base rates or “standby charges” violated an ordinance preexisting Measure D and that he was injured by the District’s refusal to provide service to Paland until overdue base rates were paid. The trial court explained Paland was unlikely to prevail on this claim because ‘[t]he . . . District did not refuse to provide water service to [Paland], but rather [Paland] . . . notified the District that he did not want water service.” On appeal, Paland contends substantial evidence does not support the finding service was discontinued at his request. He cites nothing in the record to support his assertion and has thereby forfeited it. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115–1116.) In any event, ample evidence exists to support the finding.

Paland’s second cause of action alleges the District is liable for damages he incurred as a result of its continued billing of “monthly standby charges at full base rates” after the effective date of Measure D. The trial court explained Paland has no reasonable

probability of prevailing on this cause of action because it is undisputed the overdue charges on Paland's account do not exceed "those charges which predate the earliest possible effective date of [Measure D] and [Paland's] notice . . . exempting himself from service." On appeal, Paland forfeits any contention of error by making only conclusory arguments that do not address this aspect of the trial court's reasoning. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [reviewing courts may disregard points missing cogent legal argument].) To the extent Paland's eighth cause of action is based on a similar claim regarding Measure D, he has no reasonable probability of prevailing for the same reason.

In his fourth cause of action, Paland alleges fraud. Specifically, he alleges the District misrepresented, in 2003 and 2008, the existence of a moratorium on adding new water connections and that he discovered such statements were false in August 2014. The trial court explained Paland's fraud cause of action was barred by the three-year statute of limitations applicable to fraud. (See § 338, subd. (d).)

On appeal, Paland asserts injuries he allegedly suffered in 2017 delayed accrual of the statute of limitations and the statute of limitations was tolled while *Paland III* was pending in federal court. Paland is wrong. The statute of limitations was not tolled because the *Paland III* complaint did not include a fraud cause of action. (See 28 U.S.C. § 1367(d) ["[t]he period of limitations *for any claim asserted* [under the federal court's supplemental jurisdiction] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed" (italics added).) Paland admitted in his April 2018 complaint that his fraud-related injury included his inability to persuade the *Paland I* court he was paying his fair share of water system costs due to the District's false statements—statements he discovered were false in August 2014. The cause of action accrued no later than August 2014. (See *Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 282 [action does not accrue when damage is complete but "when a plaintiff first learns that a fraud may have occurred," so long as it could have been confirmed through further investigation"].)

Paland's seventh cause of action is for elder abuse. Specifically, Paland alleges he is 68 years old and that the District has abused him by improperly refusing to provide

water service. The trial court concluded Paland has no reasonable probability of prevailing on the elder abuse cause of action for the same reason previously addressed—that it was Paland himself who requested discontinuation of his water service. Substantial evidence supports the trial court's determination Paland has no reasonable probability of prevailing.

DISPOSITION

The order declaring Paland a vexatious litigant and requiring him to post security is affirmed. Respondents are entitled to their costs.

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.